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No. 00-180

IN THE

Supreme Court of the United States

EDWIN BURILOVICH and LINDA BURILOVICH, as next friends on behalf of their son BRADLEY BURILOVICH,

Petitioners,

v.

BOARD OF EDUCATION OF THE LINCOLN CONSOLIDATED SCHOOLS and RONALD GREINER, individually,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE CASE

Elaboration and response to aspects of Petitioners' Statement of the Case is necessary. In the interest of brevity, the following paragraphs have been numbered to correspond to the paragraph designations in Petitioners' Statement of the Case.

B.J.'s IEPs and Their Development

Petition ¶2. On December 17, 1993, B.J. was found eligible for special education services, having been evaluated as "preprimary impaired" (PPI) under Michigan Administrative Code R. 340.1711. This Rule states in part that:

> "Preprimary impaired" means a child through five years of age whose primary impairment cannot be differentiated through existing criteria within R. 340.1703 to R. 340.1710, or R. 340.1713 and who manifests an impairment in one or more areas of development.

The District Court correctly noted that neither side contended that B.J. should have had any other evaluation at that time. App. 35a.[1] Moreover, the PPI classification does not require a child to be reclassified along any particular timeline. Finally, and most importantly, it is undisputed that the PPI classification did not prevent B.J. from receiving any special education programs or services deemed appropriate. Dr. Burilovich signed the December 1993 IEP in agreement. App. at 41a.

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1. All references are to the Appendix attached to the Petition for Writ of Certiorari.

In December 1995, an IEP meeting was held. For the first time, B.J.'s parents demanded discrete trial therapy (DTT) for their son. When the School District resisted this proposal, the Burilovichs issued an ultimatum that B.J. would be placed in a private program if their demands were not met. They further refused to discuss IEP goals until their demands were met. App. at 43a.

Petitioners' references to the educational proposals submitted by the School District from March-May 1996 as "IEP documents," and their assertion that the School District failed to "revise the IEP" in May 1996 are misleading, as the documents at issue were not "IEPs," and cannot be considered such as a matter of law. Pet. at 6-7. The pre-1997 IDEA defined "IEP" as a written statement developed pursuant to 20 U.S.C. § 1414. 20 U.S.C. § 1401(20). This definition has been retained at 20 U.S.C. § 1401(11). *See also Blackmon v Springfield R-XII Sch. Dist.*, 198 F.3d 648, 656-57 (8th Cir. 1999) (developing an unfinished draft IEP in advance of a meeting is "not cause for concern, as nothing in the IDEA or its regulations prohibits a school district from coming to an IEP meeting with tentative recommendations for its development prepared in the parents' absence.") The district court accordingly held that an IEP "cannot be a unilateral proposal from one member of the IEPC." The court further noted that "both sides in this case agree that a written IEP was never produced following the March IEPC." *Id.* The transactions summarized at pages 5-6 of the Petition therefore did not result in the creation of an IEP.

Administrative Hearing Before the Michigan Department of Education

***Petition* ¶4.** Michigan Administrative Code R. 340.1725(2)(c) provides that the State Hearing Review Officer (SHO) may, in addition to reviewing the record of the local hearing, "[s]eek additional evidence if necessary." In this case, neither the parties nor the SHO sought to admit additional evidence. It is further undisputed that the SHO reviews the Local Hearing Officer's (LHO's) decision on a *de novo* basis. *Id.*

Procedural History

***Petition* ¶¶5-6.** Although Petitioners primarily seek review of persuasion burdens imposed at the administrative level and the deference to be given to the final level of *de novo* administrative review, this case was resolved on summary judgment. Petitioners acknowledge that neither party submitted additional evidence to the district court, and that the matter was resolved at that level on cross motions for summary judgment. Pet. at 7. The Sixth Circuit further treated the cause as having been submitted on summary judgment. App. at 7a.

REASONS FOR DENYING THE WRIT

I. THE SIXTH CIRCUIT'S DEFERENCE TO THE SHO'S DECISIONS IS CONSISTENT WITH SETTLED PRINCIPLES OF ADMINISTRATIVE LAW, AND FAILS TO RAISE THE ISSUES PRESENTED IN THE PETITION.

The Sixth Circuit's provision of "due weight" to *decisions* made at the highest level of *de novo* administrative review comports with settled administrative law principles and the IDEA's requirements. Contrary to Petitioners' argument, the Sixth Circuit neither generally blindly defers to second-tier administrative factfinding, nor did it do so in this case. Pet. at 10-11.

This Court has held that judicial review of state administrative proceedings under the IDEA occurs under the "implied requirement that due weight shall be given to these *proceedings*." *Board of Educ. v. Rowley*, 458 U.S. 176, 206 (1982) (emphasis added). This "due weight" standard was announced to prevent courts from substituting "their own notions of sound educational policy for those of the school authorities which they review." *Id.*

The "due weight" provided the administrative process and resultant judicial deference are decisional, not evidentiary. In other words, it goes "not to the testimony of witnesses or to the evidence — both of which the court must independently evaluate — but to the decisions of the hearing officers." *Heather S. v. State of Wisconsin*, 125 F.3d 1045, 1052 (7th Cir. 1997).

The Sixth Circuit similarly provides only decisional deference to the final level of administrative review. The Sixth Circuit in this case stated:

> The focus of the Supreme Court and this court upon the presumed educational expertise of state and local agencies leads to the conclusion that the amount of weight due depends upon whether such expertise is relevant to the decision-making process. As a result, less weight is due to an agency's determinations on matters for which educational expertise is not relevant, so that a federal court would be just as well suited to evaluate the situation. More weight is due to an agency's determinations on matters for which educational expertise would be relevant.

App. at 11a-12a. The Sixth Circuit has named this "due weight" standard "modified *de novo* review." *See Renner v. Ann Arbor Pub. Schls.*, 185 F.3d 635, 640-41 (6th Cir. 1999).

Contrary to Petitioners' argument, at no time did the courts reviewing this case hold that deference must be given to specific fact-finding at the second tier of administrative review. The lower courts neither announced nor acted upon a rule or standard conflicting with the proposition that witness testimony may not be disregarded on second-tier administrative review for unsupported "credibility" reasons. *Doyle v. Arlington County Schl. Bd.*, 953 F.2d 100, 104 (4th Cir. 1991), *Fort Zumwalt Schl. Dist. v. Clynes*, 119 F.3d 607, 610 (8th Cir. 1997). *See* Pet. at 12-13. Petitioners therefore inaccurately assert that the Sixth Circuit generally, and the panel in this case specifically, defer to all aspects of final administrative review in IDEA cases. Pet. at 11-17.

Finally, the fact-bound issue underlying the Petition's first two questions was resolved by the district court's conclusion that the LHO and SHO made no conflicting determinations concerning Petitioners' expert witnesses' credibility. App. at 59a -60a. The Sixth Circuit did not conduct further review of this issue. App. at 22a.

The district court rejected as unsupported the Petitioners' argument that the SHO made witness credibility evaluations conflicting with those of the LHO. The court found that the SHO's conclusions neither contradicted the LHO's factual findings, nor contained demeanor-based determinations unsupported by the record. It reasoned as follows:

> Plaintiffs argue in their reply brief that the SHO erred in making credibility determinations of Plaintiffs' witnesses that were contrary to the LHO's determinations. *See Doyle*, 953 F.2d at 105.
>
> * * *
>
> However, in *Doyle*, the SHO made credibility determinations that were completely different from those of the LHO, when only the LHO had observed the witnesses. In this case, the LHO merely stated that these doctors were "well qualified witnesses" who gave strong testimony in support of DTT. LHO Op. at 33. The SHO determined that these witnesses may have professional or personal agendas, so he discounted their testimony. This is not in conflict with the LHO's decision, and thus does not fall under the decision in *Doyle*. The SHO is allowed to make

> credibility determinations, so long as he has a basis, and the determinations are not contrary to those of the LHO who personally observed the parties.

App at 59a-60a.

On reconsideration, Petitioners argued only that the court applied "utmost deference" to the SHO's *decision*, rather than "due weight." App. at 27a. On appeal to the Sixth Circuit, Petitioners asserted only that the district court gave undue deference to the SHO in purportedly improperly resolving a material factual question on summary judgment. App. at 22a. Disagreeing with a court's conclusions, however, does not demonstrate the existence of material factual issues. *Dong v. Board of Educ. of the Rochester Comm. Schls.*, 197 F.3d 793, 799 (6th Cir. 1999). The court found Petitioners' argument unsupported by the record, finding that no material factual dispute existed. App. at 22a. Specifically, the Sixth Circuit gave "due weight" to the SHO's educational decision, which discounted (but did not discredit) the opinions offered by one of Petitioners' experts. *Id.*

The Sixth Circuit's analysis is well supported by the administrative record. The SHO expressly acknowledged in his opinion that he was to give deference to the LHO's findings of fact, "*unless* the non-testimonial, extrinsic evidence in the record will justify a contrary conclusion, or unless the record read in its entirety could compel a contrary conclusion." App. at 73a (emphasis in original; citations omitted). Simply stated, the SHO reached an educational decision by weighing the expert testimony without making "credibility" determinations on a "cold" record. This is the

very purpose of administrative review by hearing officers having specialized knowledge.

In any event, the legality of deferring entirely to credibility-based factfinding at the second level of administrative review was neither raised nor argued in this case, nor could the record support litigation or appellate review of such an issue. The Petition should therefore be denied as to the first two questions raised, because the record neither supports review of the questions, nor does the Sixth Circuit's decision raise intercircuit "conflict" considerations. Supreme Court R. 10(1)(a).

II. NEITHER THE RECORD NOR THE DECISIONS BELOW SUPPORT REVIEW OF THE ALLOCATION OF ADMINISTRATIVE AND JUDICIAL PERSUASION BURDENS.

The lower courts' disposition of this case on summary judgment renders review of allocation of administrative and judicial persuasion burdens irrelevant. In *Morton Community Unit School District No. 709 v. J.M.*, 152 F.3d 583, 587 (7th Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999), the Seventh Circuit described judicial review of IDEA cases both on summary judgment and subsequent appeal as follows:

> When the district court does not receive additional evidence — when its only role is that of reviewing court — its rulings however characterized are necessarily rulings of law, which we indeed review *de novo*, just as we review a grant of summary judgment *de novo*. *See, e.g., Hunger v. Leininger*, 15 F.3d 664, 669 (7th Cir. 1994);

Law v. Medco Research, Inc., 113 F.3d 781, 783 (7th Cir. 1997).[2]

This case similarly involved only review of issues of law. No genuine issues of fact were raised. Whether persuasion burdens applicable only to trial-level (or here, to hearing-level) consideration of *disputed* facts were properly allocated is an issue not presented by this case.

The Sixth Circuit in the present matter correctly concluded that, under the above standard, Petitioner's arguments regarding allocation of the persuasion burden are irrelevant. App. at 13a, n.3. Under Fed. R. Civ. P. 56(c), the summary judgment movant always has the initial production burden. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In an ordinary case, the persuasion burden is only a factor in determining if a genuine issue exists as to whether a party may meet the "quantum and quality of proof necessary to support liability." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). This factor is, at best, of little importance in IDEA cases where the reviewing court is required to give "due weight" to the educational decisions of administrative hearing officers under the "modified *de novo*" standard of review. *See Renner, supra.*

The summary judgment standard stands in contrast to other means by which a district court may review an IDEA case without conducting a trial. A district court may decide an IDEA case upon a closed record, although such review cannot appropriately be considered a summary judgment proceeding under Fed. R. Civ. P. 56. *Dong, supra*, 197 F.3d

2. The Seventh Circuit, consistently with *Rowley's* dictates, applies this standard while providing "due deference" to the hearing officers' decisions. *Id.*

at 798, *Doe v. Metropolitan Nashville Pub. Schools*, 133 F.3d 384, 387 n.2 (6th Cir.), *cert. denied*, 525 U.S. 813 (1998). Under such circumstances the standard of review is analogous to that applied to bench trials conducted on a stipulated record. *See Doe*, *supra*.

It is undisputed that the district court decided this case based upon the parties' cross-motions for summary judgment. Pet. at 7. The Sixth Circuit reviewed the case "as having been submitted on summary judgment," since Petitioners disputed that the district court had decided the case upon a closed record. App. at 7a. The court accordingly applied "modified *de novo*" review, giving more weight to administrative determinations on matters involving educational expertise, while at the same time ensuring that "there are no genuine issues regarding the facts essential to the hearing officer's decision." App. at 11a-13a. Analysis of persuasion burdens applicable to trial-level consideration of *disputed* facts was therefore unnecessary.

Even if relevant, persuasion burden allocation in this case is immaterial. The SHO aptly noted that "[e]ven if the District bore the burden of proof in this matter, the District's burden would have been to show that the program contained in the 5-17 IEP was appropriate." App. at 111a. The Respondents met this hypothetical burden, as the SHO found that "the challenged IEP is both valid and appropriate, and includes the maximum potential and [least restrictive environment] standards." *Id.* at 177a.

The district court, finding no conflicting facts or credibility determinations at the administrative level, gave this finding "due weight," concluding that:

> [T]he District's program was better designed to develop B.J.'s maximum potential than the more restrictive 40-hour, 1:1, DTT program proposed by Dr. Meinhold, and thus, constituted a free appropriate public education under the IDEA. The SHO's findings were well supported by the evidence on the record, and "findings of fact by a hearing officer made in a regular manner and with evidentiary support are entitled to presumptive validity." *Doyle v. Arlington Co. Schl. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991).

App. at 57a.

The Sixth Circuit affirmed, agreeing that the SHO's decision was entitled to "due weight," and emphasizing this Court's holding that the judiciary should not "substitute their own notions of sound educational policy for those of the school authorities which they review." App. at 24a, *quoting Rowley, supra*, 458 U.S. at 206. Respondents would therefore have prevailed in this case, regardless of who bore the persuasion burden.

The cases Petitioners cite from circuits placing the persuasion burden on defending school districts at various stages of IDEA proceedings do not contradict this conclusion. *See E.S. v. Independent Schl. Dist. No. 196*, 135 F.3d 566 (8th Cir. 1998) (review of district court judgment on the record), *Clyde K. v. Puyallup Schl. Dist. No. 3*, 35 F.3d 1396 (9th Cir. 1994) (district court rendered judgment after hearing additional testimony), *Walczak v. Florida Union Free Schl. Dist.*, 142 F.3d 119 (2d Cir. 1998) (review of summary judgment with no analysis of persuasion burdens), *Carlisle Area School v. Scott P.*, 62 F.3d 520 (3d Cir. 1995),

cert. denied, 517 U.S. 1135 (1996) (review of district court hearings and remands to the administrative level); *Oberti v. Board of Educ.*, 995 F.2d 1204 (3d Cir. 1993) (review of district court bench trial).

Allocation of the persuasion burden is both irrelevant and immaterial in this summary judgment case, regardless of any intercircuit conflicts concerning this issue. The lower courts properly found no genuine issues of material fact, giving "due weight" to the SHO's educational decision that, regardless of the burdens applied, the Respondents had proven their proposed program was appropriate, and met the IDEA's requirements. The record of this case therefore cannot support review of Petitioner's third question.

A. Michigan's Substantive Special Education Standards Are Irrelevant To Persuasion Burden Allocation.

Contrary to Petitioners' argument, substantive, qualitative special education standards are unrelated to procedural persuasion burden issues. Pet. at 20-22. Their argument provides no basis upon which to review persuasion burden allocation.

Persuasion burdens focus upon the *process* by which courts review cases, not the underlying substantive legal standards. Petitioners' argument to the contrary conflates the concepts of substantive statutory standards and the procedures by which compliance with those standards are judicially reviewed.

The Sixth Circuit recently correctly rejected, in *Dong v. Board of Educ. of the Rochester Comm. Schls.*, *supra*, 197 F.3d at 799, an argument identical to that made by Petitioners. The court held:

> This argument . . . confuses the substantive requirements necessary to satisfy the IDEA with the question of which party bears the burden of proof.
>
> The confusion is demonstrated by Plaintiffs' reliance on the discussion in *Tucker by Tucker v. Calloway County Board of Education*, 136 F.3d 495, 505 (6th Cir. 1998), indicating that since an appropriate education does not mean "absolutely best" or "potential-maximizing" education, the court's review must focus on whether the proposed placement was reasonably calculated to provide educational benefits. This discussion concerned the substantive requirements of the IDEA, not the burden of proof. In fact, this Court rejected a similar claim in *Cordrey [v. Euckert*, 917 F.2d 1460, 1466 (6th Cir. 1990)], in which the parents argued that the burden of proof with respect to procedural compliance should lie with the School District because an IEP's procedural compliance must be subjected to "strict review."*See also Clyde K. v. Puyallup Sch. Dist. No. 3*, 35 F.3d 1396, 1398-99 (9th Cir. 1994) (burden on party challenging administrative ruling).

Petitioners further base their argument upon an ill-defined, illusory standard. Mich. Comp. Laws Ann. § 380.1701 provides for "delivery of special education programs and services designed to develop the maximum potential of every handicap person." The Sixth Circuit recently recognized that:

> "The term 'maximum potential' has not been well-defined in Michigan law. Further, the standard may be more precatory than mandatory; it does not necessarily require the best education possible." *Brimmer v Traverse City Area Public Schools*, 872 F. Supp. 447, 454 (W.D. Mich. 1994). Michigan standards, moreover, do not require "a model education, adopting the most sophisticated pedagogical methods without fiscal or geographic constraints . . . ." *Barwacz v. Mich. Dept. of Edu.*, 674 F. Supp. 1296, 1302 (W.D. Mich. 1987). Plaintiffs concede as much, and that the interpretation of the standards is left in the reasonable discretion of the state officials dependent upon the circumstances of the case.

Renner v. Ann Arbor Pub. Schls., *supra*, 185 F.3d at 645.[3] Michigan's purported "heightened standard" provides no basis upon which to argue that the persuasion burden should be shifted to school districts in IDEA cases.

Petitioners' efforts to homogenize substantive and procedural standards is meritless, and fails to render the record susceptible to review of the alleged intercircuit conflict concerning IDEA persuasion burden allocation. Petitioners' third question is therefore unsupported by the record, and is inappropriate for review by this Court.

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3. Petitioners' counsel in this case represented the Plaintiffs in *Renner*, *supra*.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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